Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ARTHUR CALDERON, Warden, *Petitioner*,

v.

CHARLES EDWARD MOORE, JR., *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. In determining whether a constitutional rule of criminal procedure was dictated by precedent when a defendant's state judgment became final, may a federal habeas court, consistent with *Teague v. Lane*, 489 U.S. 288 (1989), limit its survey of existing law solely to the decisions of its own circuit, even though other state and federal courts disagree with the circuit rule?

2. Under 28 U.S.C. § 2254(d) as revised by the Antiterrorism and Effective Death Penalty Act of 1996, does *Faretta v. California*, 422 U.S. 806 (1975), "clearly establish" that a criminal defendant's request for self-representation is timely as a matter of constitutional law if made "weeks before trial"?

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IN THE SUPREME COURT OF THE UNITED STATES

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OPINION BELOW

A copy of the published opinion of the United States Court of Appeals for the Ninth Circuit, *Moore v. Calderon*, 108 F.3d 261 (1997), is filed in a separate volume as Appendix A. A copy of the unpublished opinion of the United States District Court filed March 31, 1995, is filed as Appendix B.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on March 7, 1997. Appendix A. This petition for writ of certiorari is filed within 90 days of the date of filing. 28 U.S.C. § 2101(c); Supreme Court Rules 13.1, 13.4. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Sixth Amendment to the United States Constitution states, in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right. . . to have the assistance of counsel for his defense."

Title 28, section 2254(d) of the United States Code, as revised by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) states, in pertinent part:

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --

> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

STATEMENT OF THE CASE

As the result of a multi-state robbery-murder spree in 1977, respondent Charles Edward Moore, Jr. (Moore) was convicted in California superior court in 1984 of two counts of first degree murder and sentenced to death. As to the issue presented here, Moore mailed a letter from jail to the master calendar court in which he asked to represent himself; the court heard the motion on the trial date, which was the next scheduled court date after it received the letter. At that point the master calendar court was ready to transfer the case to a waiting trial court; defense counsel, the prosecutor, and the witnesses were ready to proceed; trial had already been continued several times at defense request for a total of eight months; and Moore said he would need a further continuance if his request were granted. The master calendar court found it would interfere with the orderly administration of justice to continue the case and denied Moore's motion to represent himself. The case was transferred to the trial court, which began hearing motions

to dismiss and suppress. Jury selection began ten days after Moore's self-representation request, and the jury was empaneled three days later. *See* Appendix A, B.

The California Supreme Court affirmed the judgment of conviction in *People v. Moore,* 47 Cal.3d 63, 762 P.2d 1218, 252 Cal.Rptr. 494 (1988). This Court denied Moore's petition for certiorari, *Moore v. California*, 490 U.S. 1095 (1989), and denied rehearing, *Moore v. California*, 494 U.S. 1050 (1990).

On November 1, 1991, Moore filed a petition for writ of habeas corpus in the district court. On March 31, 1995, the district court granted the writ on summary judgment on the ground that the state had denied Moore his right to self-representation, and ordered the state to release Moore within 60 days unless it granted him a new trial within that time. Appendix B. The state appealed and requested a stay, which was denied by the district court, the Ninth Circuit, and Justice O'Connor in her capacity as circuit justice. On May 30, 1995, the state initiated retrial proceedings in order to comply with the unstayed order.

On December 28, 1995, on its own motion, the Ninth Circuit dismissed the appeal as moot because the state was pursuing a new trial. This Court reversed that order in *Calderon v. Moore,* _ U.S. _, 116 S.Ct. 2066, 135 L.Ed.2d 453 (1996).

On February 20, 1997, when the retrial was about to commence, this Court granted a stay of the district court's order pending final disposition of the Ninth Circuit appeal. On March 7, 1997, the Ninth Circuit filed its opinion affirming the district court's issuance of the writ. In light of this Court's grant of certiorari to determine whether 28 U.S.C. § 2254(d) as revised by the AEDPA applies to pending habeas cases, *Lindh v. Murphy,* 96 F.3d 856, 869 (7th Cir. 1996), *cert. granted,* _ U.S. _, 117 S.Ct. 726, 136 L.Ed.2d 643 (1997), the Ninth Circuit issued alternative holdings based on both versions of the statute. Appendix A. At the state's request, the Ninth Circuit stayed issuance of the mandate until April 17, 1997.

REASONS FOR GRANTING THE PETITION

ARGUMENT

I.

THE NINTH CIRCUIT MAY NOT TRUMP THE STATE COURT'S GOOD FAITH INTERPRETATION OF FEDERAL LAW BY RELYING ONLY ON ITS OWN CIRCUIT PRECEDENT AND IGNORING CONFLICTING OPINIONS FROM OTHER COURTS THROUGHOUT THE COUNTRY

The Ninth Circuit held that its circuit standard of timeliness for a self-representation motion was constitutionally compelled on habeas corpus review, despite the fact that California and at least ten other state and federal courts use a different test of timeliness. By this holding, the Ninth Circuit has declared that the application of the new rule doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), depends solely on its own circuit jurisprudence, without regard for the decisional law of other state and federal courts. This regionalization of constitutional law is unsound.

In *Teague*, this Court recognized that the application of a new constitutional rule of criminal procedure on habeas corpus that was not dictated by precedent "seriously undermines the principle of finality which is essential to the operation of our criminal justice system." 489 U.S. at 309. "Thus, habeas relief is appropriate only if 'a state court considering [the petitioner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution.'" *Gray v. Netherland*, _ U.S. _, 116 S.Ct. 2074, 2083, 135 L.Ed.2d 457 (1996) (citation omitted). This doctrine "validates reasonable, good-faith interpretations of existing precedents made by state courts

even though they are shown to be contrary to later decisions." *Butler v. McKellar,* 494 U.S. 407, 414 (1990).

To determine whether a rule is dictated by precedent for *Teague* purposes, the habeas court must "'survey the legal landscape as it then existed.'" *Caspari v. Bohlen,* 510 U.S. 383, 390 (1994) (citation omitted). A rule is not constitutionally compelled, and therefore cannot be the basis for habeas relief, if the survey shows that "reasonable jurists" differ about the outcome. *Sawyer v. Smith*, 497 U.S. 227, 234 (1990).

The survey must include the decisions of both state and federal courts. *Caspari v. Bohlen,* 510 U.S. at 394-395. In *Caspari,* the Eighth Circuit Court of Appeals failed to recognize two state court opinions that conflicted with the rule sought by the defendant on habeas corpus, and considered only whether any contrary *federal* authority existed. This Court rejected that approach, stating, "Constitutional law is not the exclusive province of the federal courts, and in the *Teague* analysis the reasonable views of state courts are entitled to consideration along with those of federal courts." *Id.* at 395. This Court concluded that habeas relief was barred because the state cases (and one other federal case) demonstrated that reasonable jurists could disagree. *Id.*

In addressing the state's *Teague* claim here, the Ninth Circuit ignored *all* existing precedent, except its own circuit law. The court simply noted that it had applied the circuit standard of timeliness for a self-representation motion on habeas corpus since 1982, when it decided *Maxwell v. Sumner,* 673 F.2d 1031, 1036 (9th Cir.), *cert. denied,* 459 U.S. 976 (1982), and *Fritz v. Spalding,* 682 F.2d 782 (9th Cir. 1982). Therefore, the court reasoned, the circuit's test of timeliness was not a "new rule" when Moore's conviction became final in 1990. Appendix A.

However, state and federal courts across the country vigorously dispute when a defendant must assert the right to self-representation in order for it to be considered timely. In *Faretta v. California*, 422 U.S. 806 (1975), this

Court held that the Sixth Amendment encompasses a criminal defendant's right to represent himself at trial, "provided *only* that he knowingly and intelligently forgoes his right to counsel and that he is able and willing to abide by rules of procedure and courtroom protocol." *McKaskle v. Wiggins*, 465 U.S. 168, 173 (1984) (emphasis added). In Justice Blackmun's dissent in *Faretta*, he observed that future courts would have to grapple with a number of procedural issues left unresolved by the majority, including, "How soon in the criminal proceeding must a defendant decide between proceeding by counsel or *pro se?*" *Faretta*, 422 U.S. at 852. This Court has not addressed the specific requirements for implementing the right to self-representation in any subsequent case. As a result, in the 22 years since *Faretta* was decided, those unresolved issues have been percolating in the state and federal courts.

In particular, the question of when a defendant must assert the right to self-representation has proved pivotal, because the courts have held that a timely request is unconditional and must be granted, while an untimely request is discretionary and may be denied. *E.g., Sapienza v. Vincent,* 534 F.2d 1007, 1010 (2d Cir. 1976); *People v. Windham,* 19 Cal.3d 121, 127-128, 560 P.2d 1187, 137 Cal.Rptr. 8 *cert. denied*, 434 U.S. 848 (1977). Essentially, the courts have adopted two conflicting tests of timeliness for self-representation requests. The approaches of the Ninth Circuit and California reflect this conflict.

The Ninth Circuit finds a self-representation request timely if made before the jury is empaneled, unless it is for the purpose of delay. *United States v. Smith,* 780 F.2d 810, 811 (9th Cir. 1986). Other state and federal courts also use this bright-line cutoff. *E.g., United States v. Betancourt-Arretuche*, 933 F.2d 89, 96 (1st Cir.), *cert. denied*, 502 U.S. 959 (1991); *Chapman v. United States,* 553 F.2d 886, 894 (5th Cir. 1977); *United States v. Dougherty*, 473 F.2d 1113, 1124 (D.C. Cir. 1972); *Sapienza v. Vincent,* 534 F.2d at 1010; *State v. DeNistor*, 694 P.2d

237, 242-243 (Ariz. 1985); *Blankenship v. State*, 673 S.W.2d 578, 585 (Tex. 1984).

Under the more flexible California approach, a self-representation request is timely if made "within a reasonable time prior to the commencement of trial." *People v. Windham,* 19 Cal.3d at 128. California has expressly rejected the Ninth Circuit's jury empanelment test as "too rigid in circumscribing the discretion of the trial court." *People v. Burton,* 48 Cal.3d 843, 854 & n. 2, 771 P.2d 1270, 258 Cal.Rptr. 184 (1989), *cert. denied,* 494 U.S. 1039 (1990). Numerous courts, especially among the states, have adopted California's approach or use a similarly elastic test of when "meaningful trial proceedings" begin. *E.g., United States v. Lawrence,* 605 F.2d 1321, 1324-1325 (4th Cir. 1979), *cert. denied,* 444 U.S. 1084 (1980); *People v. Mogul*, 812 P.2d 705, 708 (Colo. 1991); *Lyons v. State*, 796 P.2d 210, 214-215 (Nev. 1990) (Cal. test); *Smith v. State*, 474 N.E.2d 973, 979 (Ind. 1985) (Cal. test); *State v. Sheppard*, 310 S.E.2d 173, 189 (W.Va. 1983); *Williams v. State*, 655 P.2d 273, 276 (Wyo. 1982) (Cal. test); *Moore v. Commonwealth,* 634 S.W.2d 426, 430-431 (Ky. 1982); *Naum v. State*, 630 P.2d 785, 788 (Okla.), *cert. denied*, 454 U.S. 1058 (1991); *Hamiel v. State*, 285 N.W.2d 639, 649 (Wis. 1979); *State v. Fritz*, 585 P.2d 173, 178 (Wash. App. 1978) (Cal. test).

As this conflict was already well defined when Moore's conviction became final in 1990, reasonable jurists clearly differed about the test of timeliness for purposes of the *Teague* analysis. However, the Ninth Circuit failed to consider the opinions of any other court in finding that its circuit test of timeliness was constitutionally compelled in this case. This approach allows the law of one circuit alone to trump a state court's interpretation of federal law, a view this Court recently dismissed as "remarkable." *See Arizonans for Official English v. Arizona*, _ U.S. _, 117 S.Ct. 1055, 137 L.Ed.2d 170, 1997 U.S. LEXIS 1455, at *28 n. 11 (1997) (Ninth Ciruit had questioned whether state courts have authority to reject decisions of federal appellate

courts on issues of federal law). Even more remarkably, the Ninth Circuit's *Teague* analysis makes constitutional principles dependent on geography. When the Ninth Circuit surveyed the legal landscape in this case, its compass stopped at the circuit's borders and its map failed to include the state courthouses within. The universe of reasonable minds contemplated by *Teague* is not so limited. In light of the widespread controversy about the appropriate standard of timeliness for self-representation requests, the Ninth Circuit was required to validate California's reasonable, good-faith interpretation of the procedural requirements of *Faretta*.[1]

The Ninth Circuit's erroneous application of the *Teague* doctrine to this issue is a serious and recurring problem for the state courts within its jurisdiction. The stakes are extremely high on this question, as *Faretta* error is considered a structural defect that is reversible per se, even though the defendant received a fair trial. *Arizona v. Fulminante,* 499 U.S. 279, 310 (1991); *McKaskle v. Wiggins,* 465 U.S. at 177 n. 8. Thus, pending habeas cases from California, Washington, and Nevada involving self-representation requests before jury empanelment are subject to automatic reversal under the Ninth Circuit's approach.[2]

Moreover, this is not the first time the Ninth Circuit has refused to honor California precedent when it conflicts with its own circuit law. *E.g., Jiminez v. Myers,* 40 F.3d 976, 981-982 (9th Cir. 1993), *cert. denied,* _ U.S. _, 116 S.Ct. 63, 133 L.Ed.2d 26 (1995) (dissenting opinion), *amending Jiminez v. Myers,* 12 F.3d 1474, 1479-1485 (9th Cir. 1993), *cert. denied* __ U.S. __, 115 S.Ct. 60, 130 L.Ed.2d 18 (1994) (dissenting opinion) (procedures upon

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1. Neither of the two exceptions to the *Teague* doctrine applies here. *See Teague v. Lane,* 489 U.S. at 307.

2. The Ninth Circuit's approach to habeas cases that are governed by 28 U.S.C. § 2254(d) as revised by the AEDPA also violates *Teague,* because the "weeks before trial" test is not dictated by precedent. *See infra,* Argument II.

jury deadlock). Judge Kozinski's pointed comments in his dissent in *Jiminez* are equally applicable to the *Faretta* issue: "What the trial judge did here wasn't an aberration; he followed a practice the California Supreme Court had approved repeatedly. Giving today's rule retroactive application will have a profound and unsettling effect on hundreds of convictions entered by the courts of California and other states in this circuit. In many cases, there will be no hope of retrying the defendants. Retroactive application of the new rule thus significantly impairs these states' legitimate interests in maintaining convictions secured through procedures their courts reasonably believed conformed with due process." *Id.*, 12 F.3d at 1482.

Accordingly, we ask this Court to grant certiorari in order to settle whether a federal habeas court may conclude that a rule of law is dictated by precedent under *Teague v. Lane* based solely on the previous decisions of its own circuit, even though other state and federal courts interpret the Constitution differently.

II.

AN INTOLERABLE CONFLICT EXISTS AMONG THE COURTS OF THIS COUNTRY REGARDING THE STANDARD OF TIMELINESS FOR A SELF-REPRESENTATION REQUEST

By its alternative opinion in this case purporting to apply 28 U.S.C. § 2254(d) as revised by the AEDPA, the Ninth Circuit has imposed on the state courts a mechanical rule of timeliness for self-representation requests that is not and has never been compelled by this Court's jurisprudence. According to the Ninth Circuit, this Court has expressly decreed that a defendant's motion for self-representation is timely, no matter what the circumstances, if made "weeks before trial."

As noted above in Argument I, the state and federal courts essentially have adopted two different approaches to the timeliness issue. Until now, courts from both camps have agreed on one point: that *Faretta* itself provided no guidance on this question. *E.g., United States v. Teague*, 953 F.2d 1525, 1540 (11th Cir.), *cert. denied*, 506 U.S. 842 (1992) (concurring opinion) ("the announcement of the constitutional right to self-representation in *Faretta* - in light of the Court's silence as to the timeliness question in that case - did not in itself preclude consideration of the timing of the invocation of the right"); *Horton v. Dugger*, 895 F.2d 714, 716-717 (11th Cir. 1990) (*Faretta* "did not address the issue directly"); *United States v. Lawrence*, 605 F.2d at 1324 ("In *Faretta* the Court was not called upon to resolve" the question of timeliness); *Chapman v. United States*, 553 F.2d at 893, 895 (*Faretta* "did not have to face the problem" of timeliness, and left open that procedural requirement); *Lyons v. State*, 796 P.2d at 214 (Supreme Court "has not specifically addressed the element of timeliness of a request for self-representation"); *Williams v. State*, 655 P.2d at 276 ("*Faretta* left many important procedural questions, including the question of timeliness of a request to proceed pro se, unanswered"); *Hamiel v. State*, 285 N.W.2d at 648 (question of timeliness "did not present itself" in *Faretta*); *Russell v. State*, 383 N.E.2d 309, 314 (Ind. 1978) (particular facts in *Faretta* did not establish standard of timeliness); *People v. Windham*, 19 Cal.3d at 126 (*Faretta* was "rather nonspecific" on timeliness issue).

The decision in this case is the first to hold that *Faretta* did announce a rule of law concerning the timeliness of a self-representation request. The Ninth Circuit found this Court's description of the request in *Faretta* as being made "weeks before trial" to be an express holding on the timeliness question. The Ninth Circuit interpreted "trial" as the start of jury selection. The Ninth Circuit therefore concluded that, for purposes of revised § 2254(d), *Faretta* "clearly established" a rule that a self-representation motion

is timely per se if made more than 14 days before jury selection commences. Appendix A.

The Ninth Circuit's analysis dramatically misreads the scope of *Faretta*. By noting when the request for self-representation was made in *Faretta*, this Court implied that some time limitation may be imposed on the assertion of the right, but it did not articulate a definitive standard. This Court certainly did not impose a rigid chronological measurement consisting of the number of days which separate a self-representation request and the start of jury selection, without regard to any attendant circumstances. Every court that has considered the issue in the last two decades has failed to discern such a test, including all previous panels of the Ninth Circuit itself. Such universal myopia is unlikely.

Thus, the Ninth Circuit wrongly concluded that the "weeks before trial" test constituted "clearly established Federal law, as determined by the Supreme Court of the United States," under revised § 2254(d). The question whether a rule of law is "clearly established" under the revised statute requires essentially the same analysis as a claim under *Teague v. Lane*. *See Lindh v. Murphy*, 96 F.3d at 869; *cf. Drinkard v. Johnson*, 97 F.3d 751, 766-767 & n. 21 (5th Cir. 1996), *cert. denied*, _ U.S. _, 117 S.Ct. 1114, 137 L.Ed.2d 315 (1997).[3/] Accordingly, habeas relief is unavailable if the rule sought by the defendant was not "dictated by precedent" when the state conviction became

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3. In *Lindh*, the Seventh Circuit held that whether rules are "clearly established" under revised § 2254(d) "are the sorts of questions presented by the *Teague* standard [citations], and the 'clearly established' language is unlikely to pose a different kind of interpretive challenge." 96 F.3d at 869. In *Drinkard*, the Fifth Circuit rejected the defense argument that the revised statute essentially codifies *Teague*, and declined to determine whether "the language of the statute somehow parallels Supreme Court precedent in this area." 97 F.3d at 766-767 & n. 21. We believe this case presents an appropriate opportunity for this Court to clarify the scope of revised § 2254(d) as to issues that previously have been analyzed solely under *Teague*.

final, because it was susceptible to debate among reasonable jurists. *Sawyer v. Smith*, 497 U.S. at 234.

It is beyond question that the "weeks before trial" test of timeliness imposed by the Ninth Circuit in this case was not "clearly established" by Supreme Court authority. In 22 years no court has interpreted *Faretta* in such a manner, and jurists across the country disagree about the appropriate test. In enacting the revisions to § 2254(d), Congress could not have meant to authorize the lower appellate courts to reverse state judgments based on completely novel interpretations of Supreme Court law.

This conflict over the standard of timeliness for self-representation motions has serious consequences for the administration of criminal justice. Trial courts in California, Washington, and Nevada may faithfully follow the mandates of their state supreme courts, only to find their rulings summarily reversed by the Ninth Circuit on habeas corpus under the AEDPA. *See, e.g., People v. Clark,* 3 Cal.4th 41, 89-101, 833 P.2d 561, 10 Cal.Rptr.2d 554 (1992), *cert. denied,* 507 U.S. 993 (1993) (state supreme court affirmed capital judgment where trial court denied defendant's motion to represent himself during pretrial motions, 25 days before jury selection began; federal habeas petition has not yet been filed in No. CV-92-6567 RMT). Further, if the "weeks before trial" test imposed in this case serves to guide other federal habeas courts, criminal judgments from other states that use the same approach as California also will be imperiled.

The effect of such an arbitrary test is especially pernicious in this case, because it allowed the Ninth Circuit to ignore a number of relevant factors surrounding Moore's *Faretta* motion, including that Moore requested a continuance (which the court would have been obliged to grant, as it could not force him to trial unrepresented and unprepared); the prosecutor and defense counsel were ready to proceed; a courtroom was available to try a lengthy capital case; several witnesses from other states were standing by to come to California; and trial had already been

continued for eight months. The fact that in limine proceedings caused a 10-day lag in the start of jury selection cannot be a constitutionally significant event under *Faretta*, as the Ninth Circuit's opinion in this case would establish.

The Ninth Circuit's addition of yet another test of timeliness to the already fractious legal landscape creates even more confusion about the requirements of *Faretta*. Certiorari is essential to resolve whether the decision in this case is compelled by this Court's precedents.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court grant the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Dated: April 17, 1997.

Respectfully submitted,

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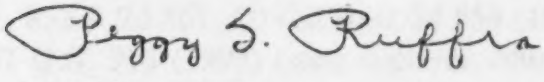

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